Supreme Court, U.S.
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No. 94-1915

In The

Supreme Court of the United States

October Term, 1994

JOSEPH B. SHUMATE, JR.,

Petitioner,

v.

NCNB CORPORATION AND ITS SUBSIDIARIES, now NationsBank,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did petitioner have actual possession of his Employee Retirement Income Security Act of 1974 ("ERISA") pension funds when the funds were paid out of the district court registry to him and he distributed over $255,000 to numerous individuals and deposited $59,000 of the funds in a bank account?

2. Does petitioner's election in 1983 to receive his pension benefits by monthly payments exempt the funds from garnishment, even though the petitioner's election was later reversed by a settlement agreement in which he joined, resulting in petitioner's receiving a lump sum payment and releasing the plan from any and all obligations to petitioner?

RULE 29.1 LIST

Respondent NCNB Corporation and its subsidiaries, now NationsBank Corporation ("NCNB"), is a publicly traded corporation. NCNB has no parent company. NCNB has the following nonwholly owned subsidiaries: Charter Bancshares, Inc.; Commonwealth National Bank; Internet, Inc.; and Southeast Switch, Inc.

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Respondent NCNB Corporation and its subsidiaries, now NationsBank Corporation ("NCNB"), respectfully submits their brief in opposition to the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Virginia is reported at 829 F. Supp. 178 (W.D. Va. 1993).

STATEMENT OF THE CASE

Petitioner Joseph B. Shumate is the former president of Coleman Furniture Corporation ("Coleman Furniture"). He was a participant in the Coleman Furniture Pension Plan (the "Plan"), a qualified plan under the Employee Retirement Income Security Act of 1974 ("ERISA"). Article 16.1 of the Plan contained the anti-alienation provision required for qualification under § 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1) ("each pension plan shall provide that benefits provided under the plan may not be assigned or alienated").

Coleman Furniture filed for reorganization under Chapter 11 of the Bankruptcy Code in 1982. In 1983, Shumate's employment with Coleman Furniture was terminated.

In 1984, Shumate filed a petition under Chapter 11 of the Bankruptcy Code. The case was later converted to a Chapter 7 proceeding. In 1985, Shumate was denied a discharge for secreting some of his assets in the bankruptcy case. The denial was affirmed by the district court. Shumate was convicted of a crime for those activities.

In 1987, a dispute arose between Shumate and the Coleman Trustee over the amount of Shumate's benefits under the Plan. Another dispute arose between Shumate and the Shumate Trustee as each asserted the exclusive right to Shumate's benefits.

In November 1987, Shumate, the Coleman Trustee and the Shumate Trustee entered into a written contract (hereinafter "the Agreement") settling the dispute

between Shumate and the Coleman Trustee, but not settling the dispute between Shumate and the Shumate Trustee. (App. 1-5). Paragraphs 1 and 2 of the Agreement state that the Coleman Trustee will direct payment of Shumate's interest in the Plan, $250,000 ("the Fund"), to the clerk of the district court ("the Clerk"), and that Shumate will release the Coleman Trustee and the Plan "from any and all claims, demands, and causes of action which arise from . . . the participation of Shumate in the Plan." Paragraph 4 of the Agreement further states that:

> 4. The method of payment of Shumate's benefits, whether as a lump-sum, an annuity, installments or some combination of these, shall be determined by the litigation between Shumate and [the Shumate Trustee], or any settlement therein, and shall not involve or affect [the Coleman Trustee] in any way.

By order entered December 3, 1987, the district court incorporated the Agreement and approved its terms. (App. 6-9). Shumate endorsed the order without objection.[1] Thereafter, the Fund was paid into the general registry of the court.

On July 26, 1990, in Civil Action No. 86-0433-R, the district court entered judgment in favor of NCNB against Shumate for $200,000 plus certain interest and attorney's fees. In March, 1992, after an appeal to the Fourth Circuit Court of Appeals, in which error was found in the district court's calculation of interest and attorney's fees, the

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[1] The Order allowed the Coleman Trustee "to proceed with the termination of the . . . Plan without any further involvement with Shumate's benefits." (App. 6-7).

district court, upon remand, increased the judgment against Shumate in favor of NCNB to $410,000. The judgment has been accruing interest since that date.

In May, 1992, NCNB filed a motion for payment of the Fund pursuant to 28 U.S.C. § 2042, obtained a writ of execution, and filed a suggestion for summons in garnishment. A garnishment summons was issued by the Clerk and served upon Shumate and the garnishee.

The competing claims of Shumate and the Shumate Trustee to the Fund were ultimately resolved in Shumate's favor by this Court on June 15, 1992. *Patterson v. Shumate*, 504 U.S. 753, *reh'g denied*, 113 S.Ct. 13 (1992).

In June, 1992, Shumate filed a petition for payment of the Fund to him and filed motions to deny NCNB's petition for payment of the Fund to it and to quash NCNB's writ of execution and garnishment. By memorandum opinions and orders entered in October and November, 1992, the district court held that the Fund was exempt from garnishment under ERISA while held in the court registry because the payment of the Fund into the registry, as agreed to by Shumate, did not constitute an actual receipt of the Fund by Shumate. The court granted Shumate's motion for payment of the Fund and quashed NCNB's garnishment. The Fourth Circuit affirmed in Appeal No. 94-2474, decided May 18, 1993. (App. 10-14).

In June, 1993, Shumate filed a petition for payment of the Fund to him, which was granted over NCNB's objection. Shumate received the Fund, $362,975.23, by a series of checks from a bank which held the Fund for the district court's registry. Shumate distributed $255,263.12 of the Fund to various individuals, none of whom had a

judgment against Shumate, and deposited a $59,000 check in a savings account at Premier Bank, Inc., Wytheville, Virginia ("Premier Bank").[2] Thereafter, NCNB issued a notice of lien to Premier Bank, pursuant to Va. Code § 8.01-502, effectively freezing the funds. Shumate then filed a motion to quash the notice of lien.

The district court conducted an evidentiary hearing on June 25, 1993. Shumate contended that the funds traceable to his pension benefits remained protected from garnishment under ERISA's anti-alienation provision. By opinion and order entered June 30, 1993, the district court denied Shumate's motion to quash as to the funds originating in the Plan. The court held that the ERISA exemption from garnishment had terminated upon Shumate's actual receipt of his pension benefits. *NCNB Financial Services, Inc. v. Shumate*, 829 F. Supp. 178 (W.D. Va. 1993).

Shumate appealed to the Fourth Circuit. In Appeal No. 93-2092, decided December 29, 1994, the Fourth Circuit affirmed. (App. 18-21). Shumate petitioned for rehearing with suggestion for rehearing *en banc*, which was denied by order filed February 6, 1995. Shumate moved to stay the mandate pending application to this

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[2] In an affidavit filed with the district court in June, 1993, Shumate swore that he had deposited $107,712.11 at Premier Bank. (App. 15-17). Shumate now admits that he deposited only $59,000. (Petition for Writ of Certiorari at 21). Shumate has never accounted for the remaining $48,712.11 of the Fund.

Court for a writ of certiorari, which motion was denied by order filed February 15, 1995.[3]

SUMMARY OF REASONS FOR DENYING THE WRIT

Shumate does not dispute the fact that the ERISA exemption from garnishment expires when the pensioner receives his plan benefits. Instead, Shumate contends that the remaining funds are exempt from garnishment because he never had possession of the funds. Shumate's argument is utterly without merit. It is based upon alleged facts that are either false or irrelevant to the issue of actual possession.

Shumate's election in 1983, to receive his pension benefits by monthly payments, does not provide grounds for exempting the benefits under ERISA. Pursuant to a

[3] Although not reflected by the record in this case, the following events have occurred since February 15, 1995. On March 10, 1995, the district court issued a garnishment summons, with a return date of May 15, 1995, which was served upon Shumate and the garnishee, Premier Bank. Shumate claimed an exemption from garnishment under Va. Code § 34-34 and a hearing was held on his claim on May 10, 1995. By order entered May 11, 1995, the district court denied the claim and denied Shumate's further motion to stay the order pending appeal to the Fourth Circuit. Shumate next filed a motion with Fourth Circuit Judge H. E. Widener, Jr., seeking a stay of the district court's order pending appeal, which motion was denied by order filed May 15, 1995. On May 15, 1995, Premier Bank paid the funds held in Shumate's accounts, $62,966.40, to NCNB. On May 19, 1995, Shumate filed a notice of appeal to the Fourth Circuit regarding the district court's denial of his exemption claim.

subsequent settlement agreement with the Plan, Shumate received his pension benefits in a lump sum payment, although they were directed into the court's registry to abide the resolution of the dispute between Shumate and his bankruptcy trustee. Shumate released the Plan from any and all obligations to Shumate arising from his participation in the Plan.

REASONS FOR DENYING THE WRIT

THE ERISA EXEMPTION FROM GARNISHMENT EXPIRED WHEN THE FUND WAS DISTRIBUTED FROM THE DISTRICT COURT REGISTRY TO SHUMATE.

In Appeal No. 92-2474 to the Fourth Circuit, Shumate successfully argued that the Fund was exempt from garnishment under ERISA because it was in the district court registry and had not been "actually" received by Shumate. Shumate actually received the Fund, $362,975.23, in June, 1993, when the Clerk paid the Fund to him. Shumate has since distributed at least $255,263.12 of the Fund to various individuals, who, unlike NCNB, held no judgment. Now Shumate contends that ERISA shields the remaining funds from garnishment because he has not "constructively" received the benefits. Shumate further contends that because he elected, in 1983, to receive his pension benefits by monthly payments, ERISA continues to shield the remaining funds until he purchases an annuity and thereafter receives periodic payments. These arguments will be addressed in order.

A. Shumate actually received the Fund.

Title 29 U.S.C. § 1056(d)(1) states that each ERISA qualified plan must contain a provision prohibiting the assignment or alienation of plan benefits. Although the statute does not mention involuntary transfers, this Court has held that it proscribes garnishment of employee benefits held in a qualified plan. *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 110 S.Ct. 680, 685, 107 L.Ed. 2d 782 (1990).

ERISA benefits are not forever immune from garnishment. Indeed, it is clear that the ERISA exemption from creditor process terminates when the plan benefits are actually received by the pensioner. *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 836, 108 S.Ct. 2182 (1988) (ERISA's anti-alienation provision "bars the assignment or alienation of pension plan benefits, and thus prohibits the use of state enforcement mechanisms only insofar as they prevent those benefits from being paid to plan participants"); *Guidry v. Sheet Metal Workers Natl. Pension Fund*, 10 F.3d 700, 703-05, 708-13 (10th Cir. 1993), *modified on reh'g and remanded on other grds*, 39 F.3d 1078 (10th Cir. 1994) (en banc) (ERISA anti-alienation provision did not bar garnishment of pension benefits paid into debtor's bank account); *Trucking Employees of North Jersey v. Colville*, 16 F.3d 52, 55-56 (3d Cir. 1994) (funds distributed from ERISA pension plan are not protected from garnishment by ERISA's anti-alienation provision); *Velis v. Kardanis*, 949 F.2d 78, 82 (3d Cir. 1991) (assets distributed from ERISA qualified plan to pensioner are no longer pension assets and are not afforded ERISA anti-alienation protection); *Tenneco, Inc. v. First*

Virginia Bank of Tidewater, 698 F.2d 688, 690-91 (4th Cir. 1983) (ERISA pension benefits paid to terminated employee subject to garnishment); *Brosamer v. Mark*, 561 N.E.2d 767, 771 (Ind. 1990) (29 U.S.C. § 1056 does not shield pension benefits from garnishment after they are received by beneficiary).

Shumate does not dispute the fact that the ERISA exemption from garnishment terminates when the pensioner receives his plan benefits. Instead, Shumate contends that the $59,000 deposited at Premier Bank, plus accrued interest thereon, are exempt from garnishment because he did not take "constructive possession" of the funds. (Petition for Writ of Certiorari at 29-36). Shumate cites the following alleged facts as supporting his position: (1) the $59,000 check Shumate deposited at Premier Bank was not cashed; (2) the remaining funds were placed in a "trust account"; and (3) Shumate intended to use the remaining funds to purchase an ERISA qualified annuity. *Id.* at 25, 29 and 32. The first alleged fact is false. The other alleged facts are irrelevant to the issue of actual possession.

The Fund was paid to Shumate by a series of checks issued by Virginia First Savings Bank. Almost immediately thereafter, Shumate distributed at least $255,263.12 of the Fund to various individuals. Shumate deposited $59,000 of the remaining amount in an account at Premier Bank. (App. 22-23).[4] Shumate had to endorse

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[4] Shumate swore, by affidavit, that he had deposited the entire remaining amount, $107,712.11, with Premier Bank. (App. 15-17). Before this Court, without mentioning his affidavit, Shumate offers the excuse that he "inadvertently failed" to

the check received from Virginia First Savings Bank in order to make the deposit. Thus, Shumate's claim that the check was not "cashed" is false. It was deposited, an act of control over the fund by Shumate.

The alleged fact that the remaining funds are held in a "trust" account at Premier Bank, and the potential for the funds to be reinvested in an ERISA qualified annuity, do not support Shumate's claim that he never possessed the funds. Shumate possessed the funds when he endorsed the check received from Virginia First Savings Bank and deposited the proceeds in the account. Further, Shumate possessed the funds after the deposit because, as the sole owner of the account, Shumate had the absolute right to withdraw funds from the account at any time. (App. 24). There was no document explaining the terms of the "trust." It was simply a word used by Shumate in setting up the account, presumably to frustrate creditors. The account was not ERISA qualified, and Shumate was under no obligation to purchase an ERISA approved annuity with the funds.

Accordingly, the funds are subject to garnishment because the funds have been actually received by Shumate and are not in any ERISA qualified plan.

B. Shumate's 1983 payment election provides no basis for exemption under ERISA.

Shumate contends that ERISA continues to shield the funds from garnishment because in 1983 he elected to

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deposit with Premier Bank one of the checks he received from Virginia First Savings Bank. (Petition for Writ of Certiorari at 21).

receive his benefits in monthly payments. Shumate cannot, and does not, deny that, pursuant to a subsequent settlement with the Coleman Trustee, the funds were paid into the court registry in a lump sum. Instead, Shumate argues that the Coleman Trustee had a duty to make monthly payments notwithstanding his agreement to the contrary. Therefore, he argues, no lump sum payment should have been made and the benefits remain in an ERISA qualified plan. In making this argument Shumate ignores the critical transactions in which he actively participated.

In his agreement with the Coleman Trustee, (App. 1-5), Shumate released the Coleman Trustee and the Plan from any duty to make monthly pension payments to Shumate. Paragraphs 1 and 2 of the Agreement state that the Coleman Trustee will direct payment of $250,000 into the district court registry, such amount being Shumate's entire interest in the Plan, and that upon payment Shumate will release the Coleman Trustee and the Plan "from any and all claims, demands, and causes of action which arise from . . . the participation of Shumate in the Plan." The $250,000 was paid into the court registry as agreed, thereby releasing the Coleman Trustee from any duty to make monthly pension payments to Shumate.

The Agreement further provided as follows:

> 4. The method of payment of Shumate's benefits, whether as a lump-sum, an annuity, installments or some combination of these, shall be determined by the litigation between Shumate and [the Shumate Trustee], or any settlement therein, and shall not involve or affect [the Coleman Trustee] in any way.

Agreement, ¶ 4. Shumate petitioned the district court for a lump sum payment. In June, 1993, the court granted Shumate's petition and paid the funds to him in a lump sum as he requested, over NCNB's objection. Of the approximately $360,000 received by Shumate, he paid over $255,000 to various alleged creditors, admittedly unsecured, refusing to pay so much as a penny upon NCNB's judgment. Of the remaining amount, $59,000 was deposited in a savings account at Premier Bank that was not an ERISA qualified plan. Shumate was not required to roll the remaining funds over into an ERISA qualified plan.

Shumate's argument that he is entitled to receive monthly payments from an ERISA qualified plan is another maneuver to defeat NCNB's collection rights. Shumate elected to receive a lump sum payment so that he would have immediate control over the money. Shumate gambled that NCNB would not find any of the money and lost. He has no valid complaint about the consequences of his decision.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN M. HODGES
(Counsel of Record)
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Counsel for Respondent

SETTLEMENT AGREEMENT

THIS AGREEMENT, dated November 12, 1987, is between ROY V. CREASY, Trustee in Bankruptcy of Coleman Furniture Corporation and Plan Administrator of the Coleman Furniture Corporation Pension Plan ("Creasy"); JOSEPH B. SHUMATE, JR. ("Shumate"); JOHN R. PATTERSON, Trustee in Bankruptcy for Joseph B. Shumate, Jr. ("Patterson"); and the COLEMAN FURNITURE CORPORATION PENSION PLAN ("Plan").

A. Creasy, the Plan and Patterson are currently involved in a law suit entitled *In Re Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation v. Coleman Furniture Corporation Pension Plan;* Civil Action No. 86-0272-R in the United States District Court for the Western District of Virginia, ("the Suit").

B. Shumate, Creasy and Patterson are or have been involved in an adversary proceeding styled *John R. Patterson, Trustee, v. Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation and Joseph B. Shumate, Jr.;* Adversary Proceeding No. 7-87-0133 in the United States Bankruptcy Court for the Western District of Virginia (the "Adversary Proceeding").

C. In the course of this litigation Shumate has disputed the amount of this benefits from the Plan as determined by Creasy. Shumate has also alleged that Creasy has breached his fiduciary duty to Shumate as Plan Administrator of the Plan. Creasy and Shumate wish to resolve all matters between themselves regarding the amount and method of payment of Shumate's benefits from the Plan and all other claims that Shumate may have

against Creasy arising out of Shumate's participation in the Plan and Creasy's administration of the Plan.

D. Shumate has filed a complaint with the Pension Benefit Guaranty Corporation alleging that Creasy has improperly determined the benefits under the Plan in connection with the termination of the Plan.

E. The parties intend that this agreement will settle all matters between Creasy and Shumate with respect to the Plan, but that this agreement does not resolve the dispute between Patterson and Shumate regarding the proper recipient and the proper method of payment of Shumate's benefits from the Plan.

THEREFORE, in consideration of the following mutual agreements, the parties agree that:

1. Creasy shall direct Signet Trust Company, the Trustee of the Plan, to pay $250,000.00 in escrow to the Clerk of the United States District Court for the Western District of Virginia to be invested in interest-bearing accounts in federally-insured banks or savings and loan associations provided that no more than $100,000.00 of principal shall be invested in any one institution (unless otherwise agreed by Shumate and Patterson with the court's approval) during the litigation between Shumate and Patterson.

2. Upon payment to the District Court Clerk by Signet Trust Company, Shumate and Patterson shall release and discharge fully and forever Creasy, the Plan, Signet Trust Company, all other fiduciaries of the Plan from any and all claims, demands, and causes of actions

which arise from any purported acts, omissions, transactions, obligations, or events connected with the participation of Shumate in the Plan or referred to in the pleadings of the Suit or the Adversary Proceeding.

3. This Agreement is based on Shumate's benefits determined as if he had elected early retirement benefits beginning July 1, 1984. The amount of the payment from the Plan for the payment of Shumate's benefits pursuant to this Agreement has been determined on the basis of the cost of a single payment annuity providing Shumate with monthly payments of $1,603.23 beginning December 1, 1987, and continuing for his lifetime, plus an amount representing monthly payments in the same amount beginning July 1, 1984, and continuing through November 1, 1987, and accrued interest on these payments at the rate of 7-1/2% per year. The foregoing notwithstanding, the funds paid from the Plan to the Court and the income earned by this fund shall be the sole source of funds to satisfy the payment of Shumate's benefits from the Plan, and the amount of these benefits shall be determined by the total amount of the fund held in escrow by the Clerk when the litigation between Patterson and Shumate is resolved.

4. The method of payment of Shumate's benefits, whether as a lump-sum, an annuity, installments or some combination of these, shall be determined by the litigation between Shumate and Patterson, or any settlement therein, and shall not involve or affect Creasy in any way.

5. The parties agree that they shall seek to have this settlement approved and included, to the extent necessary or appropriate, in an order of the court. If the court's

approval is not obtained, then this settlement agreement shall become void at the election of any party.

6. Shumate shall notify the Pension Benefit Guaranty Corporation of the resolution of his dispute with Creasy and the Plan. Shumate shall execute whatever documents are necessary to terminate the PBGC administrative proceeding.

7. Shumate acknowledges that Creasy has not warranted the income tax consequences of this settlement in any way, and Shumate is not relying on Creasy as to the income tax consequences of this settlement.

8. The parties agree that any term of this agreement, including the payment of the amount specified in paragraph 1 of this agreement should not be construed as an admission or acknowledgment by any party of the accuracy of any allegation or of any wrongdoing under Federal, state or local law.

9. This agreement constitutes the complete understanding between the parties.

WITNESS the following signatures:

/s/ Roy V. Creasy
Roy V. Creasy, Trustee in
Bankruptcy of the Coleman
Furniture Corporation and
Plan Administrator
Date 11-20-87

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.
Date 11-20-87

/s/ John R. Patterson
John R. Patterson, Trustee
in Bankruptcy for
Joseph B. Shumate, Jr.
Date 12/1/87

COLEMAN FURNITURE
CORPORATION PENSION PLAN

/s/ Roy V. Creasy
by Roy V. Creasy,
Plan Administrator
Date 11/26/87

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
(Roanoke Division)

IN RE:

ROY V. CREASY, Trustee in Bankruptcy for Coleman Furniture Corporation Plaintiff	)	Civil Action No. 86-0272-R
v.	)	
COLEMAN FURNITURE CORPORATION PENSION PLAN Defendant	)	

ORDER

This matter came to be heard upon the pleadings previously filed and the agreement of the parties as shown by their endorsement of this Order.

1. The Court finds that two issues are before it regarding payment of the benefits of Joseph B. Shumate, Jr., from the Coleman Furniture Corporation Pension Plan. First, John R. Patterson, Trustee in Bankruptcy for Joseph B. Shumate, Jr., claims that Shumate's benefits should be paid to him and administered as part of Shumate's bankruptcy estate. Second, Shumate claims that the amount of his benefits is greater than the amount determined by Roy V. Creasy, Trustee and Plan Administrator of the Pension Plan.

2. The Court finds that it is proper for a settlement of the issue regarding the amount of Shumate's benefits

to be made which permits the payment of funds in escrow under the supervision of the Court, because this will permit Creasy to proceed with the termination of the Pension Plan without any further involvement with Shumate's benefits.

3. The Court has considered a settlement agreement dated of November 12, 1987, which has been submitted to the Court and finds that the terms of the settlement set forth in this Agreement are appropriate.

THEREFORE, it is ORDERED that Roy V. Creasy, Trustee, as Plan Administrator of the Coleman Furniture Corporation Pension Plan, is authorized to direct the payment of $250,000.00, representing Shumate's entire interest in the Pension Plan, from the Pension Plan to be deposited with the Clerk's Registry Fund, which fund shall be maintained by the Clerk of this Court in a short-term (no longer than 35 days) Certificates of Deposit as follows:

$100,000.00 at Jefferson Savings & Loan Association, Roanoke, Virginia

$100,000.00 at Virginia First Savings Bank, Roanoke, Roanoke, Virginia

$ 50,000.00 at Southwest Virginia Savings & Loan Association, Roanoke, Virginia.

Each Certificate of Deposit shall bear the Tax Identification Number of Joseph B. Shumate, Jr., (231-24-6423), and such sum is to be deposited with the Clerk of this Court in the Clerk's Registry Fund until such time as the rights between Shumate and Patterson to this fund are resolved.

It is further ORDERED that the Court ratifies, approves, and incorporates into this order by reference the Agreement between Creasy, Shumate, Patterson and the Plan dated November 12, 1987, and all the terms of the Agreement are to be enforced as part of this order.

It is further ORDERED that Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation, is dismissed as a party defendant in the Adversary Proceeding in the United States Bankruptcy Court for the Western District of Virginia, styled *In re: Joseph B. Shumate, Jr., Debtor and John R. Patterson, Trustee v. Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation and Joseph B. Shumate, Jr.*; Case No. 7-84-00549; Adversary Proceeding No. 7-87-0133.

The Clerk of this Court is directed to send certified copies of this Order to the Clerk of the United States Bankruptcy Court for the Western District of Virginia, G. Steven Agee, Esq., James F. Douthat, Esq., Harry S. Rhodes, Esq., and Joseph B. Shumate, Jr.

And this case is continued.

ENTER This 3 day of
December 1987.

/s/ Glen M. Williams
Judge

We request entry of this Order:

/s/ Harry S. Rhodes
Harry S. Rhodes, Esq.
Counsel for Roy V. Creasy,
Trustee in Bankruptcy for
Coleman Furniture Corporation
and Plan Administrator for
the Coleman Furniture
Pension Plan

Seen and not objected to:

/s/ G. Steven Agee
G. Steven Agee, Esq.
Counsel for John R. Patterson,
Trustee

Seen and not objected to:

/s/ James F. Douthat, Esq.
Counsel for NCNB
Financial Services

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NCNB Financial Services, Incorporated, (now NationsBank), *Plaintiff-Appellant,*	)	
v.	)	No. 92-2474
Joseph B. Shumate, Jr.; John R. Patterson, Trustee; Coleman Furniture Corporation; Roy V. Creasy, Trustee; Coleman Furniture Corporation, Pension Plan, *Defendants-Appellees.*	)	

Appeal from the United States District Court for the Western District of Virginia, at Roanoke.
Glen M. Williams, Senior District Judge.
(CA-83-279-R, CA-86-433-R, CA-86-432-R, CA-86-272-R)

Submitted: February 18, 1993

Decided: May 18, 1993

Before MURNAGHAN and NIEMEYER, Circuit Judges, and SPROUSE, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Stephen McQuiston Hodges, PENN, STUART, ESKRIDGE & JONES, Abingdon, Virginia, for Appellant. Joseph B.

Shumate, Jr., Pulaski, Virginia; John R. Patterson, Roanoke, Virginia; William M. Mercer-Meidinger, Richmond, Virginia; Roy V. Creasy, VOGEL & CROMWELL, Roanoke, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

NCNB Financial Services, Inc. (NCNB) appeals the district court's order denying its motion for payment of funds held in the court registry and the order denying its motion to alter or amend judgment under Fed. R. Civ. P. 59. The issue is whether Joseph Shumate's pension fund benefit, which has been held in the district court's registry since 1987, is still entitled to protection under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.A. §§ 1001-1461 (West 1985 and Supp. 1992), or whether it is subject to garnishment by NCNB in satisfaction of its judgment against Shumate.

Shumate was president of Coleman Furniture Company and was a participant in Coleman's pension plan. It is undisputed that this plan was a "qualified plan" under ERISA. *See Patterson v. Shumate*, 60 U.S.L.W. 4550, 4552 (U.S. 1992); 29 U.S.C.A. § 1056(d)(1) (West Supp. 1992). Coleman filed for reorganization under Chapter 11 of the Bankruptcy Code in 1982; Shumate's personal bankruptcy followed two years later. A dispute then arose among Shumate, the trustee of Shumate's bankruptcy estate (the

"Shumate trustee"), and the trustee of Coleman's bankruptcy estate (the "Coleman trustee") over Shumate's interest in the Coleman pension plan. Shumate settled the dispute with the Coleman trustee for $250,000 and agreed to payment of this amount into the district court's registry, pursuant to Fed. R. Civ. P. 67, pending the outcome of the dispute between Shumate and the Shumate trustee.

The dispute between Shumate and the Shumate trustee, over the inclusion of Shumate's pension benefit in his bankruptcy estate, was ultimately settled by the United States Supreme Court. *Patterson v. Shumate*, 60 U.S.L.W. 4550 (U.S. 1992). The Supreme Court upheld this Court's decision that Shumate's interest in the Coleman pension fund was not includible in his bankruptcy estate. *See Shumate v. Patterson*, 943 F.2d 362 (4th Cir. 1991).

While the pension matter was pending, NCNB obtained a judgment against Shumate as guarantor on a note to Coleman and also on a personal promissory note. This Court affirmed the district court's award to NCNB, but remanded for recalculation of interest and attorneys' fees. *NCNB Fin. Servs. v. Shumate*, No. 90-2026 (4th Cir. Jan. 15, 1992) (unpublished). The revised judgment, as of March 1992, totalled $410,000.

The present appeal stems from NCNB's attempt to partially satisfy its judgment by levying on Shumate's pension fund, which is still being held in the district court. The district court determined that (1) the fund was absolutely protected by ERISA while in the hands of the district court, and (2) that its status once paid to Shumate was not ripe for decision because he had not yet received the funds. NCNB appeals.

First, the district court was correct in determining that Shumate's pension fund was absolutely protected by ERISA while in the district court's registry. NCNB admits that "statutes and regulation proscribe garnishment of employee benefits held in a qualified plan." (Appellant's informal brief, p. 9).* *See Tenneco v. First Virginia Bank*, 698 F.2d 688, 689-90 (4th Cir. 1983) ("[A]n employee's accrued benefits under such a qualified plan may not be reached by judicial process in aid of a third-party creditor," even if the benefits are fully vested and may be withdrawn at the employee's request). NCNB argues that this protection no longer applies, however, because the funds are not being held in an ERISA qualified plan, but rather in the district court's registry. It is NCNB's position that the benefits were "distributed" to Shumate when the Coleman trustee paid the funds into the district court's registry. The district court disagreed, finding that "[w]hat is dispositive, according to cases interpreting ERISA, is whether the assignment of the benefits occurred after an *actual*, and not constructive, distribution was made to the employee." *See Tenneco*, 698 F.2d at 690; *see also Smith v. Mirman*, 749 F.2d 181 (4th Cir. 1984). We find no support for NCNB's position. Therefore, we agree with the district court's conclusion.

Second, the district court correctly determined that the fate of the funds once in Shumate's hands was not ripe for decision as no payout has yet occurred. Shumate has a sixty-day rollover period in which to invest the

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* The Supreme Court held that Coleman's pension plan contained the requisite restriction on alienation to qualify as a "qualified plan." *Patterson v. Shumate* 60 U.S.L.W. at 4552.

pension funds in another qualified plan. 26 U.S.C. § 402(a)(5). Because it is impossible to know yet whether Shumate will take advantage of this provision, the district court was unable to rule on the bank's ability to garnish the funds once they were turned over to Shumate. Therefore, we affirm both orders of the district court appealed by NCNB. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Count and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

NCNB FINANCIAL SERVICES, INC. Plaintiff v. JOSEPH B. SHUMATE, JR. Defendant	)	Civil Action #86-0433-R Civil Action #83-0279-R

NCNB FINANCIAL SERVICES, INC. Plaintiff v. COLEMAN FURNITURE CORPORATION Defendant	)	Civil Action #86-0432-R

ROY V. CREASY, TRUSTEE Plaintiff v. COLEMAN FURNITURE CORPORATION PENSION PLAN Defendant	)	Civil Action #86-0272-R

AFFIDAVIT

On this date, Joseph B. Shumate, Jr. personally appeared before me, the undersigned notary public, and being sworn says:

That $756.00 in social security benefits are deposited in my checking account # 2543192 with Premier Bank monthly and that the $624.47 balance frozen from NationsBank lien filed on 6/16/93 derived from my May social security payments I received on about June 3, 1993.

I state further that I received from the clerk of the US District Court for the Western District of VA $366,098.27 less $3,123.04 held by the court for administrative fees on June 11, 1993 and paid $255,263.12 to numerous persons for funds and interest advanced to me for my maintenance and support in lieu of my rightful pension which was due me from June 1, 1983. I transferred $107,712.11 to Premier Bank to hold pending roll over of these funds to another approved plan or be placed in annuity under the protection of the Coleman Pension Plan.

The affiant saith no more

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.
P. O. Box 2092
Pulaski, Virginia 24301

State of Virginia
Pulaski County Virginia, 2-WIT:

Comes now, Joseph B. Shumate, Jr., first being dually [sic] sworn on his oath, deposed and said that all matters set forth in foregoing affidavit are true.

/s/ Joseph B. Shumate, Jr.

Subscribed and sworn before me this 25th day of June, 1993. Given under my hand this 25th day of June, 1993

My commission expires: 1-31-95

/s/ Vanessa E. Dobbins
Notary Public

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONSBANK OF NORTH CAROLINA, N.A., successor to NCNB National Bank of North Carolina; NCNB National Bank, successor to NCNB Financial Services, Inc., *Plaintiff-Appellee,* and ROY V. CREASY, Trustee, *Plaintiff,* v. JOSEPH B. SHUMATE, JR., *Defendant-Appellant,* and COLEMAN FURNITURE CORPORATION; COLEMAN FURNITURE CORPORATION PENSION PLAN, *Defendants.*	No. 93-2092

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
Glen M. Williams, Senior District Judge.
(CA-83-279-R, CA-96-432-R, CA-86-433-R, CA-86-272-R)

Submitted: October 18, 1994

Decided: December 29, 1994

Before MURNAGHAN and NIEMEYER, Circuit Judges, and SPROUSE, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Joseph B. Shumate, Jr., Appellant Pro Se. Stephen McQuiston Hodges, PENN, STUART, ESKRIDGE & JONES, Abingdon, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Joseph B. Shumate, Jr., appeals the district court's order denying his motion to quash a notice of lien on his bank account filed by Nationsbank to satisfy a judgment obtained by its predecessor in interest, NCNB Financial Services, Inc. Shumate was president of Coleman Furniture Company and was a participant in Coleman's pension plan. Coleman filed for bankruptcy in 1982; Shumate's personal bankruptcy followed two years later. A dispute then arose among Shumate, the trustee of Shumate's bankruptcy estate (the "Shumate Trustee"), and the trustee of Coleman's bankruptcy estate (the "Coleman Trustee") over Shumate's interest in the Coleman pension plan. Shumate settled the dispute with the Coleman Trustee for $250,000, and agreed to payment of this amount into the district court's registry, pursuant to Fed. R. Civ. P. 67, pending the outcome of the dispute

between Shumate and the Shumate Trustee. That dispute was ultimately settled by the United States Supreme Court which held that Shumate's interest in the Coleman pension fund was not includible in his bankruptcy estate. *Patterson v. Shumate*, 60 U.S.L.W. 4550 (U.S. 1992).

While that case was pending, NCNB (now Nationsbank) obtained a judgment against Shumate as guarantor on a note to Coleman and also on a personal promissory note. This Court affirmed the district court's award to NCNB, but remanded for recalculation of interest and attorneys' fees. *NCNB Fin. Servs. v. Shumate*, No. 90-2026(L) (4th Cir. Jan. 15, 1992) (unpublished). The revised judgment, as of June 1993, was $410,000, plus interest from July 26, 1990.

NCNB initially attempted to satisfy its judgment by levying on the fund while it was still in the district court's registry. In *NCNB Fin. Servs. v. Shumate*, No. 92-2474 (4th Cir. May 18, 1993) (unpublished), this Court determined that the funds were unreachable by creditors until after an actual, and not constructive, distribution was made.

In June 1993, the district court clerk paid out the $250,000, plus interest, to Shumate. Nationsbank immediately filed a notice of lien on Shumate's bank account in which he had deposited the money. The district court determined that the funds were no longer protected by the anti-alienation provisions afforded by ERISA (29 U.S.C. § 1056(d)(1) (1988)) and denied Shumate's motion to quash the notice of lien as to funds originating from the Coleman pension plan. Shumate's motion to alter or

amend the judgment pursuant to Fed. R. Civ. P. 59 was also denied. Shumate noted a timely appeal.

Shumate contends that the ERISA anti-alienation protection continues during the sixty-day rollover period provided by I.R.C. §§ 402, 403 (1988). Our review of the district court's opinion and this Court's decision in *Tenneco, Inc. v. First Virginia Bank*, 698 F.2d 688 (4th Cir. 1983) discloses that Shumate's contention is without merit. Accordingly, we affirm on the reasoning of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

JOSEPH B SHUMATE JR
TRUSTEE FOR COLEMAN PENSION
FUND
P O BOX 2092
PULASKI VA 24301

REGULAR PERSONAL
ACCOUNT: 541623

06/17/93 THRU 06/30/93

FDIC PAGE 1

EFFECTIVE AUGUST 1, 1993 ALL PASSBOOK SAVINGS WILL BE CONVERTED TO STATEMENT SAVINGS. ALL SAVINGS STATEMENTS WILL BE MAILED ON JUNE 30 AND DEC 30 OF EACH YEAR WITH INTEREST BEING CREDITED ON THESE DATES ALSO.

DESCRIPTION	DEBITS	CREDITS	DATE	BALANCE
ACCOUNT OPENED.....			06/17/93	
DEPOSIT		59,000.00	06/17/93	59,000.00
INTEREST		90.52	06/30/93	59,090.52
BALANCE THIS STATEMENT.....			06/30/93	59,090.52

TOTAL CREDITS	(2)	59,090.52
TOTAL DEBITS	(0)	.00
TAX ID NUMBER		231-24-6423
INTEREST THIS STATEMENT		90.52
INTEREST PAID 1993		90.52

JOSEPH B SHUMATE JR
TRUSTEE FOR COLEMAN PENSION
FUND
P O BOX 2092
PULASKI VA 24301

REGULAR PERSONAL
ACCOUNT: 541623

07/01/93 THRU 12/31/93

FDIC PAGE 1

DESCRIPTION	DEBITS	CREDITS	DATE	BALANCE
BALANCE LAST STATEMENT.....			06/30/93	59,090.52
INTEREST		1,191.52	12/31/93	60,282.04
BALANCE THIS STATEMENT.....			12/31/93	60,282.04

TOTAL CREDITS	(1)	1,191.52
TOTAL DEBITS	(0)	.00
TAX IDENTIFICATION NUMBER		231-24-6423
INTEREST THIS STATEMENT		1,191.52
INTEREST PAID 1993		1,282.04

PREMIER BANK INC.

Ownership of Account-Personal:
X-Trust

Dated Opened – 6/15/93
By – VD
Date of Birth – 6/6/29
Present Employer – self

Backup Withholding Certifications
TIN: 231-24-6423

X Taxpayer ID Number – the Taxpayer Identification Number shown abive [sic] (TIN) is my correct taxpayer indentification [sic] number.

/s/ Joseph B. Shumate, Jr.

Account Owner Name & Address:
Joseph B. Shumate Jr. trustee
for Coleman Pension Fund
P.O. Box 2092
Pulaski, VA 24301

Account Number: 54162-3
Number of signatures required: 1

Type of Account: X-Existing
X-Personal
X-Savings

Signature(s) – The undersigned agree(s) to the terms stated on the front and back of this form, and acknowledge(s) receipt of a completed copy on today's date. The undersigned also acknowledge(s) receipt of a copy of and agree(s) to the terms of the following disclosure(s):

X-Deposit Account Disclosure

X-Funds Availability Disclosure

/s/ Joseph B. Shumate Jr.